

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

JOANNE GARDNER,

Respondent.

No. 39009-4-II

UNPUBLISHED OPINION

Hunt, J. – The State appeals the trial court’s grant of Joanne Gardner’s motion to set aside its bench trial verdict finding her guilty of third degree theft following a trial for second degree theft. The State argues that the trial court abused its discretion in “reversing” its verdict after entering findings of fact and conclusions of law in support of that verdict.¹ Both parties agreed below that the trial court had authority to consider this lesser included offense. And it is undisputed that the evidence is sufficient to support the trial court’s verdict on the lesser included offense. Thus, the issue on appeal is whether the trial court erred as a matter of law in believing it could find Gardner guilty of third degree theft where neither party asked it to consider this lesser

¹ The State also argues that the trial court abused its discretion by limiting closing arguments to 20 minutes per side. Because we reverse and reinstate the trial court’s verdict, we do not address this argument.

included offense. We reverse and remand to the trial court to reinstate its verdict of guilty for third degree theft and to sentence Gardner accordingly.

FACTS

Joanne Marie Gardner, a State Parks Department employee, repeatedly stole money when she processed payments from self-pay park facilities. Aggregating the multiple small thefts as part of a common scheme or plan, the State charged her with one count of second degree theft, alleging that on 16 separate occasions she had stolen an aggregated total of at least \$280. During the bench trial on second degree theft, neither party argued or asked the trial court to consider any lesser included offenses.

Initially rendering an oral verdict, the trial found Gardner not guilty of second degree theft but guilty of third degree theft, an uncharged lesser included offense. The trial court found that the State had failed to prove all of the individual thefts and that the State had proven Gardner stole only \$186.50, a misdemeanor amount. The trial court agreed to postpone entering its written verdict and findings until Gardner could research the trial court's authority to convict her of this lesser included third degree theft offense.

Gardner moved to set aside the oral verdict finding her guilty of third degree theft. Conceding that the trial court had authority to consider this lesser included offense, she argued that the verdict was not in the "interest of justice", CP at 42, because neither party had asked the trial court to consider a lesser included offense, which thus implied that both parties had chosen to take a "felony or nothing" approach.² Report of Proceedings (RP) (Jan. 23, 2008) at 3-4, 8; CP

² Gardner also implied that the bench trial had put her at a disadvantage because had there been a jury trial, both parties would likely have objected, for tactical reasons, to the trial court's sua

at 42. The State responded that the trial court had authority to enter a verdict on the lesser included offense, even absent a request by either party.³

The trial court denied Gardner's motion. Nevertheless, acknowledging Gardner's arguments about the unfairness of the trial court's guilty verdict on an uncharged lesser offense that neither party had argued, the trial court announced its willingness to consider a defense motion to reconsider this ruling. The trial court also clarified that it was finding Gardner guilty of only one count of third degree theft, rather than several misdemeanor thefts, because the State had chosen to charge Gardner with a single count of second degree theft based on the aggregated value of the smaller thefts, rather than separate counts for each individual act.

At the sentencing hearing, the trial court entered written findings of fact and conclusions of law finding Gardner not guilty of second degree theft and guilty of one count of the lesser included offense of third degree theft. The trial court emphasized, however, that it had not yet decided whether to reconsider its earlier denial of Gardner's motion to set aside its third degree theft verdict.

The State (1) noted that it had anticipated a guilty verdict on either second or third degree theft, despite not having asked the trial court to consider the lesser included offense; and (2) informed the trial court that it would request \$8,135.56 in restitution, including reimbursement for

sponte instructing the jury on the lesser included offense of third degree theft.

³ The State asserted that (1) it had anticipated such a verdict; (2) it would have requested a lesser included instruction had this been a jury trial; and (3) Gardner's closing argument had implied a lesser included offense because she asked the trial court not to consider some of the "missing checks" toward the charged aggregate amount of money, which left open the possibility of finding that Gardner had stolen less than a felony amount. Clerk's Papers at 49.

the \$186.50 third degree theft and extensive investigation costs, which Gardner deemed excessive. Commenting that it was hard to believe the State would anticipate a misdemeanor conviction given the extensive investigation costs, the trial court set a restitution hearing and stated it would reconsider its previous denial of Gardner's motion to set aside the lesser included offense guilty verdict.

Ultimately, the trial court granted Gardner's motion and "reversed" its verdict finding Gardner guilty of third degree theft. In its memorandum opinion, the trial court emphasized that (1) the State had chosen to aggregate numerous misdemeanor thefts into a single felony second degree theft charge; (2) the State had never asked the trial court to consider a lesser included offense; (3) although the trial court sitting without a jury is presumed to know the law, the parties have a right to determine their own trial strategies and, therefore, it is the parties' responsibility to ask the trial court to consider a lesser included offense; (4) the trial court "need[s]" one of the parties "to *request* a lesser included" offense in "a clear and unambiguous statement," Clerk's Papers (CP) at 69-70; and (5) absent such request, "[b]oth parties must live with their choices." CP at 69-70. The trial court then entered a "new" verdict memorializing its original oral finding Gardner not guilty of second degree theft and "revers[ing] its [third degree theft] verdict rendered on December 19, 2008." CP at 74. The State appeals.⁴

⁴ Initially our court commissioner conditionally dismissed as non-appealable the State's appeal of the trial court's "not guilty" verdict on the second degree theft charge. Notation Ruling (Mar. 24, 2009). A panel of judges granted the State's motion to modify and allowed the appeal under RAP 2.2(b)(3) (State may appeal an order arresting or vacating a judgment in a criminal case as long as the appeal will not place the defendant in double jeopardy). Order Granting Motion to Modify (Mar. 24, 2009). We limited the scope of the appeal to "the order vacating Gardner's conviction." Order Granting Motion to Modify (Mar. 24, 2009).

ANALYSIS

The State argues that the trial court (1) lacked authority under either CrR 7.4 or CrR 7.5 to reconsider its oral guilty verdict on the third degree theft lesser included offense after it memorialized that verdict in writing⁵ and (2) erred in granting Gardner's motion to set aside this verdict because it erroneously concluded it could not consider a lesser included offense absent one of the parties' request. Agreeing with the State's second argument, we do not address the first.

We review for abuse of discretion a trial court's decision to grant a motion for reconsideration. *State v. Parada*, 75 Wn. App. 224, 235, 877 P.2d 231 (1994). Clearly the trial court would have been required to consider the lesser included offense if either party had so requested.⁶ See *State v. Workman*, 90 Wn.2d 443, 447, 584 P.2d 382 (1978). But that was not the case here.

Both parties agreed below that the trial court had authority to consider the lesser included offense, even though neither party argued or requested that it do so. But Gardner argued that it was unfair for the trial court to consider the lesser included third degree theft offense absent a specific request by either party, both of whom had prepared and presented their cases focusing solely on the charged second degree offense.

Holding the State to its decision to charge a single count of second degree theft, the trial

⁵ The State does not argue that the trial court lacked authority to reconsider its oral verdict on grounds other than CrR 7.4 and CrR 7.5. In our view, it is of no consequence to our decision that the trial court set aside its earlier oral guilty verdict after memorializing it in writing.

⁶ Neither party asserts that the evidence here would not have supported a lesser included instruction.

court emphasized that the State had chosen to aggregate numerous misdemeanor thefts so it could charge Gardner with a felony and seek substantial restitution. The trial court appeared to believe that absent a request by either party to consider the lesser included offense, it could not sua sponte enter a verdict of guilty of third degree theft.⁷ This conclusion is wrong as a matter of

⁷ The trial court also clearly believed it was unfair for the State to have waited months to aggravate multiple misdemeanor thefts and then to seek restitution for nearly \$8,000 in investigative costs. RP (Feb. 6, 2009) at 4.

law. *See* RCW 10.61.003; RCW 10.61.006;⁸ RCW 10.61.010;⁹ *State v. Atterton*, 81 Wn. App., 470, 473, 915 P.2d 535 (1996) (court of appeals may remand for entry of judgment on lesser degree offenses when trial court necessarily found the lesser offense).

The trial court had authority to consider the lesser included offense, especially under the facts of this case, where the State aggregated multiple misdemeanor thefts to achieve a felony amount total. The trial court noted no lack of evidence to support the trial court's verdict and no procedural deficiencies in entering it; nor does our independent review reveal any. We hold, therefore, that the trial court erred as a matter of law and abused its discretion in granting Gardner's motion for reconsideration and "reversing" its lawfully entered guilty verdict on third degree theft.¹⁰

⁸ Neither RCW 10.61.003 nor RCW 10.61.006 expressly provide that a trial court sitting without a jury may find a defendant guilty of a lesser included or lesser degree offense when neither party has asked it to consider a lesser offense. Nevertheless, such a finding would not violate any due process notice requirements because these statutes provide the required notice and apply to a trial court sitting as a finder of fact as well as to a jury. *State v. Peterson*, 133 Wn.2d 885, 889, 892-92, 948 P.2d 381 (1997).

⁹ Furthermore, RCW 10.61.010 expressly provides: "Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime"

¹⁰ Even were we to consider the State's first argument, we would agree that the trial court could not reconsider its verdict on the lesser included offense under either CrR 7.4 (arrest of judgment) or CrR 7.5 (new trial). Gardner did not establish any of the CrR 7.4(a) criteria: lack of jurisdiction, failure of the information to charge a crime, or insufficient proof of a material element of the crime. Similarly, CrR 7.5 does not apply because Gardner did not request a new trial. Even if she had requested a new trial, she did not meet any of the CrR 7.5(a) criteria.

We reverse and remand to the trial court to reinstate Gardner's third degree theft conviction and to sentence her for that crime.¹¹

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Bridgewater, P.J.

Quinn-Brintnall, J.

¹¹ The State asks us to remand to a different judge for sentencing and restitution, asserting that the trial court's comments showed bias. In our view, the record does not support this assertion. Therefore, we deny this request.